

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARIA JIMENEZ, as Personal
Representative of the Estate of JOSE
RAMIREZ JIMENEZ,

Plaintiff,

v.

CITY OF OLYMPIA; PAUL BAKALA
and STACY BAKALA and the marital
community thereof; MIKE HOVDA
and JANE DOE HOVDA and the marital
community thereof; CHUCK GASSETT
and JANE DOE GASSETT and the marital
community thereof; CITY OF LACEY;
JOHN DOE AALBERS and JANE DOE
AALBERS and the marital community
thereof; and JOHN DOE SAPINOSO and
JANE DOE SAPINOSO and the marital
community thereof,

Defendant.

Case No. C09-5363RJB

ORDER ON DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the court on Defendants' Motion for Summary Judgment. Dkt. 12. The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

RELEVANT FACTS

At about 12:30 a.m. on November 15, 2008, Olympia Police Officers, including defendants

1 Chuck Gassett, Mike Hovda and Paul Bakala (Olympia Police Officers), responded to State Avenue
2 and Wilson Street in Olympia. Dkt. 13-3, at 3. They found Joshua Eden lying on the sidewalk,
3 suffering from a gunshot wound in his leg. Dkt. 13-3, at 4 and 19. Witnesses at the scene reported
4 that Mr. Eden and a friend were crossing the street when a black Honda Del Sol approached; the Del
5 Sol stopped; Mr. Eden said something; the driver of the Del Sol shot Mr. Eden and drove away. Dkt.
6 13-3, at 6, and 19-20. A friend of the victim told Officer Bakala that the shooter was the driver of a
7 blue or black Del Sol. Dkt. 26, Exh. B, at 54. The friend said he "didn't get a real clear look at him,
8 but he did remember he was dark skinned. He thought he was either a black or Hispanic male." Dkt.
9 26, Exh. B, at 54. Officer Gassett testified at his deposition that Officer Hovda and other officers
10 described the shooter as a young, white male, dark skin, short dark hair, twenties to thirties. Dkt. 26,
11 Exh C. At 84. Officer Hovda stated that some witnesses saw one male in the vehicle; some saw two.
12 Dkt. 26, Exh. D, at 71. Officer Hovda found one bullet shell casing near the victim. Dkt. 13-3, at 31.
13 While officers were at the scene, the dispatch center checked the state registry and radioed back that
14 there were 109 Del Sol automobiles registered statewide, 60 of them black; two Del Sols were
15 registered in Thurston County, one green and one red. Dkt. 26, Exh. C, at 21.

16 At about 5:45 a.m., while driving westbound on Fourth Avenue, Officer Hovda observed
17 what appeared to be a black Honda Del Sol with two occupants stopped by the front of the
18 convenience store at the Shell service station located just east of the Fourth Avenue and Pacific
19 Avenue intersection, within a few blocks of where the Eden shooting had occurred. Dkt. 13-3, at 33.
20 Officer Hovda entered the Shell station lot, drove by the Del Sol, and then stopped on nearby
21 Chambers Street. Dkt. 13-3, at 33. During this process, Officer Hovda confirmed that the vehicle
22 was a Honda Del Sol, and took the license number. Dkt. 13-3, at 33. Officer Hovda saw only a driver
23 in the car but it appeared that the driver was waiting for someone to come out of the Shell store. Dkt.
24 13-3, at 34. Officer Hovda radioed for backup assistance from Officers Bakala and Gassett. As he
25 waited, the Del Sol backed up and pulled in front of the convenience store, facing South toward
26 Pacific, with the passenger door next to the entrance of the store. Officer Hovda testified in his
27 deposition, as follows:

28 From where I was at, I could see he got out of the driver's door and appeared very nervous to
me, almost fidgety, a lot of movement. He kept getting in the vehicle, out of the vehicle, kept

1 looking at me, looking at me, looking at the store. He seemed very nervous like he was
2 wanting someone to hurry up and then also just the indication that I got was that he was very
nervous about I was there.

3 Dkt. 13-3, at 34. Officer Hovda observed that the driver was a male with "slightly darker skin." Dkt.
4 13-3, at 34.

5 Officers Hovda and Bakala agreed via radio to stop the driver of the Del Sol at the Shell
6 station. Dkt. 26, Exh. D, at 83. Officer Bakala entered the Shell station lot, and positioned his patrol
7 car behind the Del Sol, and put his emergency lights on. Dkt. 26, Exh. D, at 84. Officer Hovda
8 followed, stopping a little behind Officer Bakala. As he moved in, Officer Bakala saw a female come
9 out of the convenience store and get into the passenger seat of the Del Sol. Officer Bakala testified in
10 his deposition, as follows:

11 Q. So, what happened after you pulled in behind the del Sol?

12 A. I exited my patrol car, stood behind the door, because I noticed as we were pulling in, the
13 driver was really nervous, starting to look around and had some body language that he was
14 pretty nervous about our presence, and it didn't feel right, and when you get that feeling, and
15 just by his actions, the way he was looking past me and the totality of everything, I truly
16 believed that this was probably going to be the vehicle. So I stayed back behind my door,
drew my firearm, based on the fact that I believed this was an armed suspect that had just shot
somebody. I didn't point it at him, just held it in a low ready position. And I attempted to
make contact with the driver by—either I started to say something or was going to say
something and that's when the car just suddenly took off.

17 Q. Okay. And what happened next?

18 A. Officer Hovda had pulled up in a position where I was behind the vehicle and Officer
19 Hovda was kind of off my quarter panel, so it was clear that this driver knew that we were
20 obviously police officers. He took off at a high rate of speed out the entrance/exit on the
south side of the parking lot and immediately took a left heading eastbound on Pacific.

21 Dkt. 13-3, at 24.

22 Officer Gassett was in the Fourth Avenue and Pacific intersection when he saw the Del Sol
23 take off from the Shell station and skid coming onto Pacific. Dkt. 13-3, at 8. He moved in behind
24 the Del Sol with his overhead lights and siren activated. Dkt. 13-3, at 9. The Del Sol did not stop.
25 Dkt. 13-3, at 9. A high speed pursuit ensued, going east on Pacific. Dkt. 13-3, at 9. As the Del Sol
26 turned out onto Golf Club Road, it struck the barrier in the roundabout, then turned East onto 26th
27 Avenue, and then turned South onto College Street. Dkt. 13-3, at 9. Officers Bakala and Hovda
28 followed. Dkt. 13-3, at 8. Just after the Del Sol entered College Street, Officer Gassett stopped the
Del Sol by swinging his vehicle around and striking the left rear side with the front of his patrol car.

1 Dkt. 13-3, at 9.

2 Officer Gassett got out of his patrol car and stood behind the driver's side door. Dkt. 13-3, at
3 11. Officer Gassett was behind and to the left of the driver's side of the Del Sol. Dkt. 13-3, at 11.
4 Officer Bakala got out of his patrol car, moved toward Officer Gassett's patrol car, opened the right
5 front passenger door of Officer Gassett's patrol car, and stood behind it. Dkt. 13-3, at 11. Officer
6 Hovda positioned himself a few feet to Officer Bakala's right; Officer Hovda was unprotected behind
7 the Del Sol. Dkt. 13-3, at 11. All three officers had their guns drawn. An officer from the town of
8 Lacey was positioned off to the left of Officer Bakala. Dkt. 13-3, at 11.

9 Officer Gassett ordered the driver to not get out of the car, to turn the car off, and to put his
10 hands in sight. Dkt. 13-3, at 10. Officer Gassett stated in his deposition that "[h]e wasn't complying,
11 he was yelling, he was very animated with his movements, very jerky, very excited." Dkt. 13-3, at
12 11. Officer Gassett stated that "[h]e was moving his arms around in frantic motions, very jerky, not
13 making any sense. His head was jerking left and right, his body was moving a lot." Dkt. 13-3, at 11.
14 Officer Gassett stated that the driver said things like "[l]eave me alone;" "I didn't do anything;"
15 "[w]hat do you want?" Dkt. 13-3, at 11.

16 Officer Bakala described the driver of the Del Sol as "very upset, moving around. The guy
17 just seemed to be a little bit out of it." Dkt. 13-3, at 26. Officer Bakala stated that the driver seemed
18 "really agitated and really upset." Dkt. 13-3, at 26. Officer Bakala said that the driver yelled "What
19 did I do, what did I do?" Dkt. 13-3, at 26.

20 Officer Hovda testified that the driver kept yelling "[w]hat did I do, what did I do?" Dkt. 13-
21 3, at 35.

22 Officer Hovda testified that "I kept saying, 'Show your hands, show your hands'". Dkt. 13-3,
23 at 35. Officer Bakala testified that the officers were shouting at the driver "repeatedly '[p]ut your
24 hands up, put your hands up'. This is ongoing, it's not just one command, this is ongoing." Dkt. 13-
25 3, at 26.

26 Officer Gassett testified at his deposition as follows:

27 Q And then at some point you stopped being able to see both those hands?

28 A Yes. He started reaching down for something on his right side with his left hand,
reaching across his body.

1 Q Did you see what he was reaching for?

2 A I couldn't see.

3 Q What did you believe he was reaching for?

4 A A gun.

5 Q Did you see a gun at any point before you fired?

6 A No.

7 Q Did you see a gun at any point?

8 A I can't say for sure. I helped take him out of the car. I know where the gun was. I
9 probably saw the gun. I can't definitely say I saw a gun at any point.

10 Q Okay. Do you remember seeing a gun at any point, you know, at any point, like ever?

11 A In the photographs of the scene, et cetera, yes.

12 Q Why did you believe that he was reaching for a gun if you didn't see a gun?

13 A Based on his actions, based on the point that I felt he shot somebody five hours earlier,
14 he wasn't giving up, he was reaching for something, he was animated, he was not
obeying orders and I felt he was reaching for a weapon.

15 Dkt. 13-3, at 15.

16 Officer Gassett testified that, during this time, he heard a female passenger shout "'Don't.
17 Stop.' And then I heard her say either 'Don't do it' or Don't do that,' and I'm not sure which it was."

18 Dkt. 13-3, at 13. Officer Bakala testified as follows:

19 We continued to shout those orders and he continued to ignore them. I remember at one point
20 he's reaching over and doing this, at some point I remember the female passenger reaching
over and turning towards him, and I can just see him turning this way and just see the top of
21 his arm, she is grabbing his arms, holding onto his arms and hands and yelling, "Don't do it,
don't do it."

22 Dkt. 13-3, at 26. Officer Hovda testified as follows:

23 Eventually he gave up with what he was doing there because the female was fighting him and
telling him, "Don't do that" or "Don't do it." I could hear her yelling and screaming, and she
24 finally took ahold of his face, and that's when he stopped doing whatever he was doing in the
center console, turned and took hold of the steering wheel of the car and then I could see both
25 hands.

26 Dkt. 13-3, at 35.

27 Officer Bakala testified as to his view of what was happening:

28 Q At this point did you feel like there was an immediate threat of death or serious bodily
injury to you or others?

1 A Absolutely I did.

2 Q And that was based on him acting the way he was acting, the totality of the
3 circumstances?

4 A Yea, the totality of the circumstances is that this is clearly a vehicle that was involved
5 in the shooting, in my mind, based on everything, and now I've got a person that I
6 believe is armed and has shot someone senselessly earlier in the day, earlier in the
7 night, and now he's reaching in the center console and he doesn't want to do what we
8 are instructing him to do. I believe at that point it was a matter of time before he was
9 going to be able to produce a handgun and start shooting at us.

10 Q Did you use deadly force upon him at this point?

11 A No.

12 Q Why not?

13 A Because I'm trying--believe me, it's crossing my mind, and it's not something that you
14 want to happen that anybody can take real lightly.

15 Q Okay.

16 A I've been there before and I've had to make these kind of decisions before and it's not
17 something you want to happen, so you try--you are constantly evaluating what's doing
18 on.

19 Q Okay. Did you believe deadly force would have been authorized at this point?

20 A Yes.

21 Dkt. 13-3, at 26.

22 Officer Hovda testified as to what happened next:

23 A He ended up starting the vehicle and putting it in--taking ahold of the shifter, and I'm
24 thinking he's going to drive forward to try to escape. I have my gun drawn. I have
25 already told him that, "If you don't show me your hands, I'm going to shoot you"
26 because I just felt that there was a gun there. And instead of putting it in a forward
27 gear, I look down and I can see the white reverse lights come on, meaning that he had
28 put it in reverse and I heard the engine accelerate.

Q And what happened next?

A My brain started going into overload. I am a couple feet behind this vehicle, I'm
trying to look for an avenue of escape, so I move to the right and I run into a fence, a
wooden fence, so I can't get out of the path that way, so I think I'm going to move
forward, can't go forward, because all he's got to do is turn to the right and shoot me,
so I move back over behind the vehicle where Officer Bakala is giving orders, we are
all giving orders, and I think about, well, maybe I can run, but then there's the width
on the sidewalk was about the width of his car, there's no place to run behind, and so I
turned to fire my weapon and I started to pull on the trigger and he put it in a forward
gear.

Q And when he put it in forward gear, you decided not to shoot?

1 A Correct.

2 Q You said that the rear lights came on like he was going to go in reverse and the engine
3 revved. Did the car move?

4 A It was shuttering, yes.

5 Q Did it actually move back toward you?

6 A You know, I could not tell you if it actually moved. I can remember like it's pushing
7 against the patrol car. I think it moved the patrol car on that time or the next time, but
8 I'm not sure.

9 Q After he put the car back in forward and you decided not to shoot, did you move from
10 where you were located?

11 A No. I was still in that same general area. There was no other place to move.

12 Q Okay. You say there was no other place to move. What do you mean by that?

13 A I already tried moving to the right and ran into the fence, couldn't move forward
14 because he'd have a better angle of a shot. Can't go back because he could still back
15 over me. And the fact that now it's pretty clear that this person is the one that
16 committed the crime of shooting this person while walking across to the sidewalk, I
17 did not feel we could let him go.

18 Q You saw where Officer Gassett was located, right?

19 A Correct.

20 Q In terms of not being hit by the del Sol, was he in a better position than you or about
21 the same?

22 A Well, he wouldn't have been hit by the del Sol, but he could have been hit by his own
23 patrol car if the del Sol had pushed his patrol car. So he had the cover of his patrol
24 car.

25 Q And that cover was--what impact, if anything, did it have on the risk that Officer
26 Gassett would be harmed?

27 A It would be less risk than myself or Officer Bakala if we are only talking impact of the
28 vehicle, of the vehicles.

Q If we are talking about the overall risk?

A The overall risk is probably pretty close to the same because if he came out with a
handgun, he could have shot at any one of us.

Q So the risk of being shot was about the same?

A I would say so.

Q But the risk of being hit by the del Sol, by the car, was less?

A Correct.

1 Q After he put the car into forward, what happened next?

2 A I heard the engine revving again like he was trying to drive away, and I started
3 thinking that maybe this female was also trying to get him to stop doing what he was
4 doing still, so, I was thinking that maybe she wasn't a willing participant of this whole
thing, so then I started thinking, well, how I can get her out of the vehicle, and I
started giving her orders to get out of the vehicle.

5 Q And what happened next?

6 A Exactly in what order it occurred, I don't know, but she ended up getting out of the
7 vehicle and the suspect put it in reverse again and I saw the vehicle starting to lunge
even further than it did before back towards Officer Bakala and I.

8 Q Okay. What happened next?

9 A Well, you could see the intensity in him inside the car when he shifted gears, when he
10 was trying to steer, he was very—it appeared to me he was very intent on doing what
11 he needed to do, and when he put it in reverse the second time, you could definitely
12 hear the tires spinning. I remember hearing a gunshot to my left for whatever reason, I
don't know, my vision, what have you, I knew what Officer Gassett was doing, and he
was firing a round into the left front tire.

13 This vehicle is still coming back at me, or it looks like it's going to come back at me,
14 and I see the driver then reach quickly toward the left center console again where they
had been fighting before, and I felt that I had to fire and stop this before one of us got
hurt, so I fired my weapon.

15 Q You said you weren't sure about the sequence. Did you make the decision to fire your
16 weapon after he had reached toward the center console again?

17 A I'm not sure about the sequence of when the female got out of the car, whether she
18 was in the process of getting out of the car at the time I fired my weapon, whether she
19 got out before or just after. I believe she got out just before I fired my weapon. But
20 the sequence for firing the weapon was the car was in reverse, it was lunging, he
reached to his right with his left hand, which was not a normal movement in my
opinion, and he was going back to that area where she was telling him don't do that,
so, there was no doubt in my mind that at that point he was reaching for a gun, and I
fired.

21 Dkt. 13-3, at 35-36. Officer Hovda testified that he shot because he thought the driver was going to
22 run over him or that the driver was reaching for a gun to shoot him. Dkt. 13-3, at 37.

23 Officer Gassett and Officer Bakala each fired two shots at the driver at about the same time as
24 Officer Hovda did. Dkt. 26, Exh. C, at 81-82; Dkt. 26, Exh. C, at 104.

25 Officer Gassett testified that, when the driver put the car in reverse, he saw Officer Hovda to
26 the right of Officer Bakala, unprotected behind the police car; and that he saw a Lacey police officer
27 to Officer Gassett's left. Dkt. 13-3, at 12. Officer Gassett testified that the Del Sol moved a couple
28 of inches in reverse, and the door frame of the patrol car bumped Officer Gassett's shin bone. Dkt.

1 13-3, at 12. Officer Gassett testified that he decided to shoot after he concluded that the driver was
2 trying to “run over my partners.” Dkt. 13-3, at 14.

3 Officer Bakala testified that the car lurched forward, then back, a couple of times; and that the
4 second time, it started to come back to the curb. Dkt. 13-3, at 27. “[Y]ou can see he is trying to
5 build momentum to free himself.” Dkt. 13-3, at 27. “[E]ither he is trying to free the vehicle or he is
6 trying to—maybe he is trying to eliminate Officer Hovda or I, but I will tell you that when that vehicle
7 popped up on the curb, the two of us were sitting ducks at that point.” Dkt. 13-3, at 27. Officer
8 Hovda stated that he thought he was at high risk of being hit by the Del Sol. Dkt. 13-3, at 27.
9 Officer Bakala stated that he believed that it was his duty to protect the community; that he believed
10 the driver of the vehicle was a danger to the community; and that it was his duty to take that person
11 into custody. Dkt. 13-3, at 27. Officer Bakala testified that the driver was in control of the scene,
12 when the driver refused to comply with the officers’ requests; and that the driver’s actions in trying
13 to acquire a handgun and trying to back into the officers and free himself created a situation in which
14 the officers did not have the ability to use any other options. Dkt. 13-3, at 28.

15 Lacey police officer Roland Sapinoso was present during the incident and described his role
16 in the incident. Officer Sapinoso testified that the driver of the Del Sol was accelerating, trying to get
17 away. Dkt. 26, Exh. E, Deposition at 62. Officer Sapinoso went to his vehicle to get stop sticks (a
18 device used to flatten tires), but as he was heading back from his car with the stop sticks, he heard the
19 shots fired. Dkt. 26, Exh. E, Deposition at 65; Dkt. 13-3, at 12.

20 The driver of the Del Sol was Jose Ramirez Jimenez. Mr. Jimenez died from his injuries.

21 This civil case was filed on June 18, 2009. Dkt. 1. On June 23, 2009, an amended complaint
22 was filed. Dkt. 5. Plaintiff Maria Jimenez, as Personal Representative of the Estate of Jose Ramirez
23 Jimenez, contends that Mr. Jimenez died as a result of injuries sustained when police officers pinned
24 Mr. Jimenez’ vehicle to the curb and fired multiple shots from a firearm or firearms. Dkt. 5., at 5.
25 Ms. Jimenez has stated claims against Defendants City of Olympia, Paul Bakala and Stacy Bakala,
26 Mike Hovda and Jane Doe Hovda, Chuck Gassett and Janet Doe Gassett, the City of Lacey, John Doe
27 Aalbers and Jane Doe Aalbers, and John Doe Sapinoso and Jane Doe Sapinoso for violation of Mr.
28 Jimenez’ rights under the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution; and

1 state law claims for negligence/wrongful death, battery/wrongful death, negligence/wrongful death.
2 Dkt. 5.

3 MOTION FOR SUMMARY JUDGMENT

4 On June 24, 2010, defendants filed a motion for summary judgment, contending that (1) the
5 Olympia Police Officers (defendants Bakala, Hovda, and Gassett) are entitled to qualified immunity
6 for the Fourth Amendment excessive force claim; (2) the Fourteenth Amendment Due Process claim
7 must be analyzed under the appropriate standard for the Fourth Amendment, and is not cognizable as
8 a separate claim; (3) plaintiff has not shown the elements required for a claim of municipal liability
9 against the City of Olympia; (4) the state law claims for battery against officers Bakala, Hovda, and
10 Gassett should be dismissed because there was no excessive force; (5) the evidence does not support
11 a claim for negligence against officers Bakala, Hovda, and Gassett; (6) the public duty doctrine bars
12 the negligence claim against the City of Olympia; and (7) there is no basis for liability against the
13 City of Lacey police officers (defendants Aalbers and Sapinoso) or the City of Lacey. Dkt. 12.

14 On July 15, 2010, plaintiff filed a response. Dkt. 25. Plaintiff moves to strike evidence and
15 statements regarding things that occurred after the Olympia police officers shot Mr. Jimenez. Dkt.
16 25, at 1-4. Plaintiff also requests dismissal of the claims against the City of Lacy and Lacey police
17 officers Aalbers and Sapinoso, pursuant to Fed.R.Civ.P. 41(a). Plaintiff affirms that she is not
18 making a substantive due process claim. In addressing the merits of defendants' motion, plaintiff
19 contends that (1) Officers Bakala, Gassett (Olympia police officers) are not entitled to qualified
20 immunity because their initial attempt to detain the driver of the Del Sol at the Shell station was
21 unreasonable; and the force used to effectuate the seizure at the scene of the shooting was excessive;
22 (2) the policy of the City of Olympia is that officers generally use more force than those with whom
23 the officers interact; (3) the battery claim against the Olympia police officers should proceed because
24 the initial attempt to detain the driver of the Del Sol at the Shell station was unreasonable; and the
25 force used to effectuate the seizure at the scene of the shooting was excessive; and (4) plaintiff's
26 negligence claim should proceed because there is an issue of fact as to whether the Olympia police
27 officers and the City of Olympia breached their duty to Mr. Jimenez to arrest him without using
28 unnecessary deadly force. Dkt. 25.

1 On July 28, 2010, defendants filed a reply, contending that (1) the *Terry* stop, if what the
2 officers did at the Shell station could be considered a stop, was based upon reasonable suspicion; (2)
3 the balancing under *Graham v. Connor*, 490 U.S. 386, 396 (1989) establishes that Officers Bakala,
4 Gassett, and Hovda used reasonable, not excessive, force; (3) Officers Bakala, Gassett, and Hovda
5 are entitled to qualified immunity; (4) the City of Olympia does not have a policy that authorizes
6 excessive use of force; (5) because the Olympia police officers did not use excessive force, there is
7 no claim for battery; (6) the Olympia defendants are protected from a claim for negligence because
8 they are protected by the public duty doctrine and because the police officers had probable cause to
9 use deadly force; and (7) the Fourth Amendment claims against the City of Lacey officers (Officers
10 Aalbers and Sapinoso) and the City of Lacey should be dismissed with prejudice, not without
11 prejudice, as requested by plaintiff. Dkt. 30. Defendants concede, for the purposes of this motion,
12 that the evidence to which plaintiff objects is not necessary, with the exception of the photograph
13 taken by Joe West (Dkt. 13-2, at 2) that depicts the position of the Del Sol at the Shell station. Dkt.
14 30, at 1-2.

15 SUMMARY JUDGMENT STANDARD

16 Summary judgment is proper only if the pleadings, the discovery and disclosure materials on
17 file, and any affidavits show that there is no genuine issue as to any material fact and that the movant
18 is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to
19 judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an
20 essential element of a claim in the case on which the nonmoving party has the burden of proof.
21 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where
22 the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party.
23 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must
24 present specific, significant probative evidence, not simply “some metaphysical doubt.”). *See also*
25 Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient
26 evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing
27 versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service*
28 *Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The court must
2 consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a
3 preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service*
4 *Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the
5 nonmoving party only when the facts specifically attested by that party contradict facts specifically
6 attested by the moving party. The nonmoving party may not merely state that it will discredit the
7 moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the
8 claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non
9 specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” *Lujan*
10 *v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

11 DISCUSSION

12 **1. Motion to Strike**

13 In her response, plaintiff moves to strike evidence of Mr. Jimenez’ body fluid level of
14 methamphetamine; evidence of the gun found in Mr. Jimenez’ vehicle; testimony by Officer Gassett
15 that he probably saw the gun sometime after he discharged his weapon; and ballistic tests and chain
16 of custody of the gun retrieved from Mr. Jimenez’ vehicle. Dkt. 25, at 1-4. Plaintiff contends that
17 this evidence is irrelevant because plaintiff’s excessive force claim depends up whether the officers’
18 actions were objectively reasonable in light of the facts and circumstances confronting them, not
19 upon what occurred after they fired the shots the resulted in Mr. Jimenez’ death.

20 Defendants concede, for the purposes of this motion, that the evidence to which plaintiff
21 objects is not necessary, with the exception of the photograph taken by Joe West (Dkt. 13-2, at 2) that
22 depicts the position of the Del Sol at the Shell station. Dkt. 30, at 1-2. Defendants contend that they
23 submitted this evidence in anticipation of arguments plaintiff could have made in her response to the
24 motion for summary judgment. Because plaintiff did not make those arguments, defendants agree
25 that the evidence identified by plaintiff, with the exception of the photograph referred to above,
26 should not be considered in ruling on this motion for summary judgment.

27 Accordingly, the court should strike evidence of Mr. Jimenez’ body fluid level of
28 methamphetamine; evidence of the gun found in Mr. Jimenez’ vehicle; testimony by Officer Gassett

1 that he probably saw the gun sometime after he discharged his weapon; and ballistic tests and chain
 2 of custody of the gun retrieved from Mr. Jimenez' vehicle. The court should deny the motion to
 3 strike the photograph taken by Joe West (Dkt. 13-2, at 2).

4 **2. Fourth Amendment Claim for Excessive Force Against Officers Bakala, Hovda, and**
 5 **Gassett**

6 *A. Civil Rights Claim.* In order to state a claim under 42 U.S.C. § 1983, a complaint must
 7 allege that (1) the conduct complained of was committed by a person acting under color of state law, and
 8 that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
 9 laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*,
 10 *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged
 11 wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir.
 12 1985), *cert. denied*, 478 U.S. 1020 (1986).

13 *B. Qualified Immunity.* Defendants in a Section 1983 action are entitled to qualified
 14 immunity from damages for civil liability if their conduct does not violate clearly established
 15 statutory or constitutional rights of which a reasonable person would have known. *Pearson v.*
 16 *Callahan*, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).
 17 Qualified immunity balances two important interests: the need to hold public officials accountable
 18 when they exercise power irresponsibly and the need to shield officials from harassment, distraction,
 19 and liability when they perform their duties reasonably. *Harlow v. Fitzgerald*, 457 U.S. at 815. The
 20 existence of qualified immunity generally turns on the objective reasonableness of the actions,
 21 without regard to the knowledge or subjective intent of the particular official. *Id.* at 819. Whether a
 22 reasonable officer could have believed his or her conduct was proper is a question of law for the
 23 court and should be determined at the earliest possible point in the litigation. *Act Up!/Portland v.*
 24 *Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

25 In analyzing a qualified immunity defense, the Court must determine: (1) whether a
 26 constitutional right would have been violated on the facts alleged, taken in the light most favorable to
 27 the party asserting the injury; and (2) whether the right was clearly established when viewed in the
 28 specific context of the case. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). "The relevant dispositive

1 inquiry in determining whether a right is clearly established is whether it would be clear to a
2 reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* While the
3 sequence set forth in *Saucier* is often appropriate, it should no longer be regarded as mandatory.
4 *Pearson v. Callahan*, at 129 S.Ct at 811. “The judges of ... the courts of appeals should be permitted
5 to exercise their sound discretion in deciding which of the two prongs of the qualified immunity
6 analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.*

7 The privilege of qualified immunity is an immunity from suit rather than a mere defense to
8 liability, and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to
9 trial. *Saucier v. Katz*, 121 S.Ct. at 2156.

10 An officer using deadly force is entitled to qualified immunity, unless the law was clearly
11 established that the use of force violated the Fourth Amendment. *See Brosseau v. Haugen*, 543 U.S.
12 194, 198 (2004).

13 *C. Fourth Amendment Prohibition on Excessive Use of Force.* The first question
14 addressed in this qualified immunity analysis is whether a constitutional right would have been
15 violated on the facts alleged, taken in the light most favorable to plaintiff.

16 The use of potentially deadly force implicates the Fourth Amendment protections that
17 guarantee citizens the right to be secure in their persons against unreasonable seizures of the person.
18 *Tennessee v. Garner*, 471 U.S. 1 (1985). The reasonableness of the force used to effect a particular
19 seizure is determined by carefully balancing the nature and quality of the intrusion on the
20 individual’s Fourth Amendment interests against the countervailing governmental interests at stake.
21 *Graham v. Connor*, 490 U.S. 386, 396 (1989). *See also Scott v. Harris*, 550 U.S. 372, 383 (2007) (“In
22 determining the reasonableness of the manner in which a seizure is effected, ‘[w]e must balance the
23 nature and quality of the intrusion on the individual’s Fourth Amendment interests against the
24 importance of the governmental interests alleged to justify the intrusion.’” *quoting United States v.*
25 *Place*, 462 U.S. 696, 703 (1983). The force that is applied must be balanced against the need for that
26 force. *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997).

27 In determining the reasonableness of officers’ actions, the court (1) assesses the severity of
28 the intrusion on the individual’s Fourth Amendment rights by considering the type and amount of

1 force inflicted; (2) analyzes the government's interests by considering the severity of the crime,
2 whether the suspect posed an immediate threat to the officers' or public's safety, and whether the
3 suspect was resisting arrest or attempting to escape; and (3) balances the gravity of the intrusion on
4 the individual against the government's need for that intrusion. *Espinosa v. City and County of San*
5 *Francisco*, 598 F.3d 528, 537 (9th Cir. 2010); *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir.
6 2003). The totality of the circumstances of each case must be considered. *Fikes v. Cleghorn*, 47 F.3d
7 1011, 1014 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d at 806, n. 2.

8 The reasonableness of a particular use of force must be judged from the perspective of a
9 reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham v. Connor*,
10 490 U.S. at 396. In addition, "[t]he calculus of reasonableness must embody allowance for the fact
11 that police officers are often forced to make split-second judgments--in circumstances that are tense,
12 uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation."
13 *Id.* at 396-97. The question is whether the officers' actions are objectively reasonable in light of the
14 facts and circumstances confronting them. *Id.* at 397. A reasonable use of deadly force encompasses
15 a range of conduct, and the availability of a less-intrusive alternative will not render conduct
16 unreasonable. *Scott v. Henrich*, 39 F.3d 912, 915(9th Cir.1994).

17 *D. Discussion.*

18 *Stop at the Shell Station.* Officers Bakala, Gassett, and Hovda responded to a shooting at
19 12:30 a.m. Witnesses reported that the driver of a black Del Sol, a male with dark, or darker, skin,
20 shot the victim. The state registry listed 109 Del Sol automobiles registered in the state; two were
21 registered in Olympia. At 5:45 a.m., these officers saw a black Del Sol at the Shell station, a few
22 blocks from where the earlier shooting had occurred. Officer Hovda stated that the driver was a male
23 with slightly darker skin, and that the driver appeared to be very nervous about why Officer Hovda
24 was there. The driver kept looking over his shoulder at Officer Hovda. Officers Bakala and Hovda
25 entered the Shell station lot; and Officer Bakala started to say something or was going to say
26 something when the car took off. At that point, Officer Bakala had drawn his weapon but the weapon
27 was kept low, behind the door of Officer Bakala's vehicle. Officer Bakala stated that the Del Sol took
28 off at a high rate of speed onto Pacific Avenue. Officer Gassett saw the Del Sol take off from the

1 Shell station and spin out coming onto Pacific. Officer Gassett moved in behind the Del Sol with his
2 overhead lights and siren activated.

3 Plaintiff contends that the officers did not have reasonable suspicion to stop the Del Sol at the
4 Shell station.

5 The officers entered the area of the Shell station parking lot. It is questionable whether the
6 officers stopped the driver of the Del Sol. At the most, Officers Bakala and Hovda drove into the
7 Shell station lot, and Officer Bakala started to say something to the driver of the Del Sol. The
8 intrusion, at that point, was minimal.

9 The court next looks at the nature of the government interests involved. If the police have a
10 reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was
11 involved in or is wanted in connection with a completed felony, a *Terry* stop may be made to
12 investigate that suspicion. *United States v. Hensley*, 469 U.S. 221, 229 (1985)(citing *Terry v. Ohio*,
13 392 U.S.1 (1968)). Here, the Del Sol matched the description of the car from which the shot had been
14 fired in the 12:30 a.m. incident, a little over four hours before a black Del Sol was located at the Shell
15 station, just blocks away from where the earlier shooting occurred. There were only 109 Del Sol
16 automobiles registered in the State. The driver was nervous when he saw officers Bakala and Hovda.
17 The officers noticed that the driver had slightly darker skin.

18 Under the circumstances, given the minimal nature of the intrusion and the strong government
19 interests involved, Officers Bakala and Hovda acted in an objectively reasonable manner when they
20 drove into the Shell parking lot and attempted to contact the driver.

21 *High Speed Chase.* The Del Sol took off from the Shell parking lot at a high rate of speed.
22 Officer Gassett moved in behind the Del Sol, with his flashing lights. The nature of the intrusion,
23 pursuit of a vehicle by use of flashing lights in an attempt to stop the Del Sol, was minimal. The
24 government interests were significant, considering that Officer Gassett knew of the 12:30 a.m.
25 shooting, the Del Sol at the Shell station matched the car involved in the earlier shooting, and the Del
26 Sol took off at a high rate of speed onto a city street. Officer Gassett acted in an objectively
27 reasonable manner in pursuing an automobile going at a high rate of speed, by flashing his lights.

28 The Del Sol led Officers Bakala, Gassett, and Hovda on a high speed pursuit. The officers

1 acted reasonably, and in the interest of public safety, in attempting to stop a driver who was driving
2 in a manner that could endanger the public.

3 *Scene of the Shooting.* Deadly force was used against the driver of the Del Sol. This is the
4 highest level of intrusion.

5 The court next analyzes the government interests involved. At the scene of the shooting,
6 Officers Bakala, Gassett, and Hovda got out of their vehicles and ordered the driver to stay in his car,
7 turn the car off, and put his hands in sight. The driver was yelling and jerking, and asked “What did I
8 do?” The officers kept asking the driver to show his hands; the driver did not comply. The driver
9 then reached over toward the console, repeatedly. The officers, who were aware of the 12:45 a.m.
10 shooting, were concerned that the driver was trying to reach for a gun. The female passenger told the
11 driver to stop. The officers believed that the passenger was trying to tell the driver to stop reaching
12 for the gun. Even then, the officers did not shoot.

13 The driver then started backing up. Officer Gassett shot at the driver’s front tire to try to get
14 the car to stop. The driver continued to try to free himself by backing up. Officer Hovda was
15 unprotected, and at risk of being hit by the car being accelerated in reverse. Officer Bakala and a
16 Lacy police officer were in the line of the car accelerating in reverse. All of the officers were at risk
17 if the driver retrieved a gun and shot at them.

18 Plaintiff contends that it was not reasonable for the officers to think that they were at risk
19 from the driver accelerating into them in reverse, because the driver’s car was stuck. Officer Gassett
20 testified that “Hovda’s got no protection at all except that this car at this point can’t get up over this
21 curb. And the angle he’s in, I don’t know if he could, I mean, a trained driver could, but I don’t
22 know.” Dkt. 26, Exh. C, at 106. Officer Gassett’s speculation about whether the driver could have
23 maneuvered the car away from the curb and into Officers Bakala and Hovda (and the Lacy police
24 officer) is not sufficient to cast doubt on the reasonable fear that the driver could, and was intending
25 to, pop away from the curb and accelerate into the officers.

26 Plaintiff argues that the officers should have permitted the Lacy police officer to use his stop
27 sticks before they fired. However, Lacy Police Officer Sapinoso was returning from his patrol car
28 with the stop sticks when the shots were fired. There is no indication that he could have used the

1 stop sticks before the shots were fired, or that the stop sticks would have changed anything.

2 Plaintiff contends that the officers were reckless in positioning themselves behind and to the
3 side of the Del Sol, so that they were at greater risk of being run into; and that Officers Hovda and
4 Bakala deliberately remained there, even after they apparently believed that they were in imminent
5 danger of being hit by the Del Sol. Officer Hovda testified that he had no way out—he was pinned by
6 the Del Sol and the fence. The other officers were in positions to try to stop and apprehend the driver.
7 It does not make sense to suggest that the officers should take themselves out of a position to stop the
8 driver/car so that the car could get away.

9 Plaintiff argues that Mr. Jiminez did not physically resist the officers. The officers believed
10 that Mr. Jiminez had been involved in the 12:30 a.m. shooting; that he had a gun in the car; that he
11 refused to comply with the officers' requests to show his hands; and that he continued to reach with
12 his left hand toward the console. Plaintiff's contention that he did not physically resist the officers is
13 unsupported by the record.

14 A review of the facts and circumstances shows that the government interests in safety of the
15 officers and safety of the public were exceedingly high.

16 Finally, the court balances the nature of the intrusion against the government interests.
17 Officers Bakala, Gassett, and Hovda shot and killed the driver. Under the circumstances, it was
18 reasonable for these officers to use deadly force to stop the driver from retrieving a gun from the
19 console and shooting them, and to stop the driver from using his car to accelerate in reverse into the
20 officers, with the possibility of seriously injuring or killing them.

21 It is easy, in retrospect, to take the scene apart and analyze it frame by frame. However, the
22 events at the scene of the shooting took place over a short period of time, and several things appeared
23 to be happening at once. Throughout the incident, the officers believed that their personal safety was
24 at risk while they were trying to protect the public from a person they believed had been involved in a
25 shooting. Based upon the totality of the circumstances, the officers' action in shooting Mr. Jiminez
26 was reasonable. Officers Bakala, Gassett, and Hovda did not violate Mr. Jiminez' rights under the
27 Fourth Amendment to be free from unreasonable seizure and use of deadly force.

28 Because Mr. Jiminez' Fourth Amendment rights were not violated, it is not necessary to

1 address whether those rights were clearly established. However, it is worth noting that the Supreme
2 Court has set forth the clearly established law on use of deadly force. Although it is clearly
3 established that an officer may not use deadly force to apprehend a suspect where the suspect poses
4 no immediate threat to the officer or others, it is not constitutionally unreasonable to prevent escape
5 using deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of
6 serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).
7 In this case, under all the circumstances, the officers had probable cause to believe that the driver of
8 the automobile posed a threat of serious physical harm when they reasonably believed that their lives
9 were in danger.

10 Officers Bakala, Gassett, and Hovda are entitled to qualified immunity on plaintiff's claim of
11 excessive force under the Fourth Amendment.

12 **3. Fifth and Fourteenth Amendment Due Process Claim**

13 Defendants claim that plaintiff has not stated a claim under the Fourteenth Amendment
14 because such a claim must be analyzed under the appropriate standard for the Fourth Amendment,
15 and is not cognizable as a separate claim. *See United States v. Lanier*, 520 U.S. 259, 272, n. 7
16 (1997)(*Graham v. Connor* requires that if a constitutional claim is covered by a specific
17 constitutional provision, the claim must be analyzed under the standard appropriate to that specific
18 provision, not under substantive due process). Plaintiff concedes that she is not making a substantive
19 due process claim. *See* Dkt. 25, at 16. Further, plaintiff does not maintain that she is making a
20 procedural due process claim. The claims under the Fifth and Fourteenth Amendments should be
21 dismissed.

22 **4. Municipal Liability Against the City of Olympia for Federal Constitutional Claims**

23 Defendants contend that plaintiff has not shown the elements for a claim of municipal liability
24 against the City of Olympia.

25 In order to set forth a claim against a municipality under 42 U.S.C. § 1983, a plaintiff must
26 show that the defendant's employees or agents acted through an official custom, pattern or policy that
27 permits deliberate indifference to, or violates, the plaintiff's civil rights; or that the entity ratified the
28 unlawful conduct. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978); *Larez v.*

1 *City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991). The municipal action must be the moving
2 force behind the injury of which plaintiff complains. *Board of County Commissioners of Bryan*
3 *County v. Brown*, 520 U.S. 397, 405 (1997). *See Jackson v. City of Bremerton*, 268 F.3d at 653
4 (Neither a municipality nor a supervisor can be held liable under § 1983 where no injury or
5 constitutional violation has occurred).

6 In this case, Officers Bakala, Gassett, and Hovda did not commit a constitutional violation
7 against Mr. Jimenez. Accordingly, there can be no municipal liability.

8 The court will, however, address the argument made by plaintiff. Plaintiff argues that the
9 City of Olympia has a policy that directs/authorizes its police officers to use more force than those
10 with whom the officers interact. Officer Gassett testified at his deposition that “This was a lethal
11 force situation. I’m not going to use something less than lethal force.” Dkt. 26, Exh. C, at 120.
12 When asked whether he would use deadly force if there were a threat of serious physical harm or
13 death to him or to others, instead of using a taser, Officer Hovda testified at his deposition that “I’m
14 not going to take a stick to a gun fight if I can help it”; “[g]enerally speaking, I’m going to use a force
15 that is above what they’re using so that I can take control of it”; “I’m going to try to use a force that
16 is greater than theirs to overcome their force”. Dkt. 26, Exh. C, at 15(Pages 54 to 57) and 58.
17 Plaintiff’s argument is without merit. Plaintiff appears to suggest that officers can only
18 constitutionally use less force than that presented to them in the situation they encounter, or force
19 equal to that presented to them. In other words, plaintiff is suggesting that the officers can use only
20 enough force to make it a fair fight. That is not the standard.

21 Plaintiff has not shown that the City of Olympia has a policy authorizing use of excessive
22 force. Moreover, plaintiff has not shown that the City of Olympia authorizes its officers to use
23 excessive force, even if officers are authorized to use deadly force to counter situations where they
24 are threatened by deadly force. The Fourth Amendment claim against the City of Olympia should be
25 dismissed.

26 **5. State Law Claims**

27 Plaintiff has alleged state law claims for battery and negligence. Defendants contend that the
28 state law claims for battery against officers Bakala, Hovda, and Gassett should be dismissed because

1 there was no excessive force; and that the evidence does not support a claim for negligence against
2 officers Bakala, Hovda, and Gassett.

3 Under 28 U.S.C. § 1367, a federal court may assume supplemental jurisdiction over all other
4 claims that are so related to claims in the action within the original jurisdiction so that they form part
5 of the same case or controversy.

6 A. *Battery*. A battery is the intentional infliction of a harmful bodily contact upon another;
7 and in order that any act may be done with the intention of bringing about a harmful contact or an
8 apprehension thereof to a particular person, the act must be done for the purpose of causing the
9 contact or apprehension or with knowledge on the part of the actor that it is substantially certain to be
10 produced. *See Garratt v. Dailey*, 56 Wn.2d 197, 200 (1955). Only when an officer uses excessive
11 force may a claim be made for battery against the officer. *McKinney v. Tukwila*, 103 Wn.App. 391,
12 408-09 (2000); *Staats v. Brown*, 139 Wn.2d 757, 780 (2000).

13 As discussed above, plaintiff has not shown that there are issues of fact as to whether the
14 Olympia Police Officers used excessive force against Mr. Jimenez. Accordingly, the claim for battery
15 against Officers Bakala, Gassett, and Hovda should be dismissed.

16 B. *Negligence*. In an action for negligence a plaintiff must prove four basic elements: (1) the
17 existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause. *Degel v.*
18 *Majestic Mobile Manor, Inc.*, 129 W.2d 43, 48 (1996).

19 In negligence actions against government entities and their employees, Washington courts
20 follow the public duty doctrine. To be actionable, the duty must be one owed to the injured plaintiff
21 specifically, not simply one owed to the public in general. *Cummins v. Lewis County*, 156
22 Wn.2d 844, 852 (2000). There are four exceptions to the public duty doctrine: (1) where there is
23 legislative intent to impose a duty of care; (2) where a special relationship exists between the plaintiff
24 and the public entity; (3) where the government has engaged in volunteer rescue efforts; or (4) where
25 there is a failure to enforce a specific statute. *Babcock v. Mason County Fire District No. 6*, 144
26 Wn.2d 774, 785-86 (2001).

27 Plaintiff maintains that the legislature intended to protect individuals from use of unnecessary
28 deadly force by police officers. Plaintiff argues that police officers may be found guilty of

1 Manslaughter in the Second Degree, RCW 9A.32.070; that homicide or use of deadly force is
2 justifiable when necessarily used by a peace officer to arrest or apprehend a person who the officer
3 reasonably believes has committed, has attempted to commit, is committing, or is attempting to
4 commit a felony (RCW 9A.16.040(c)(c)); that the necessity of use of deadly force turns on whether
5 the peace officer has probable cause to believe that the suspect, if not apprehended, poses a threat of
6 serious physical harm to the officer or a threat of serious physical harm to others (RCW
7 9A.16.040(2); and that a police officer shall not be held criminally liable for using deadly force
8 without malice and with a good faith belief that such act is justified (RCW 9A.16.040(3). Plaintiff
9 argues that the public duty doctrine does not apply because the legislature clearly intended
10 individuals to have a cause of action, based upon use of excessive force in attempting to arrest a
11 suspect. However, the language of the statute does not exhibit clear legislative intent to identify and
12 protect a particular and circumscribed class of persons. *Honcoop v. State*, 111 Wn.2d 182, 188
13 (1988); *Hannum v. Washington State Dept. of Licensing*, 144 Wn.App. 354, 360 (2008). It appears
14 that the public duty doctrine bars a claim against Officers Bakala, Gassett, and Hovda; and the City
15 of Olympia.

16 Even if the public duty doctrine does not apply, and even if plaintiff has a cause of action for
17 negligence against Officers Bakala, Gassett, Hovda, and the City of Olympia, there are no issues of
18 fact that preclude summary judgment on this claim. As discussed above, Officers Bakala, Gassett,
19 and Hovda did not use excessive force against Mr. Jimenez. Therefore, they did not breach a duty to
20 Mr. Jimenez. There is no basis for holding the City of Olympia liable on the negligence claim. This
21 claim should be dismissed.

22 **6. Claims against Officers Aalbers and Sapinoso and the City of Lacey**

23 Defendants request that the claims against Officers Aalbers and Sapinoso, and against the
24 City of Lacey be dismissed with prejudice. Plaintiff contends that there are issues of fact as to
25 whether Officers Aalbers and Sapinoso had a realistic opportunity to intervene to prevent the harm
26 from occurring; plaintiff requests that the court dismiss the claims against these defendants under
27 Fed.R.Civ.P. 41(a). Unless the court order states otherwise, a dismissal under Fed.R.Civ.P. 41(a) is
28 without prejudice.

